FOR ARGUMENT

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In The
Supreme Court of the United States

PAULA L. BUFORD,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit

REPLY BRIEF OF THE PETITIONER

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SUMMARY OF ARGUMENT

A. Fundamentally, the court of appeals below continued its interpretation of the Guidelines terms "related" and "consolidated," contrary to Respondent's argument. While functional consolidation doctrine itself results from legal construction of the Guidelines, that does not mean the interpretive task of further defining relatedness and consolidation becomes fact-finding in the district court. Historical facts remain reviewable only for clear error, Petitioner agrees, but the question here was a mixed one of the scope and meaning of terms used in Guidelines and application notes.

B. Neither congressional directive nor the tradition of trial court discretion in sentencing determines the standard of review here. This Court's earlier decisions in the area provide the guide, and lead to de novo review.

1. Standing alone, the "due deference" provision of 18 U.S.C. § 3742(e) does not point to a particular standard of review. It requires reference to the type of question at issue, as this Court said in *Koon v. United States*, 518 U.S. 81, 98 (1996). More deference is due determinations that tip factual; less is due determinations predominantly legal. The short legislative reference to what is "due" suggests recourse to this Court's standard of review decisions.

2. Likewise, traditional sentencing discretion suggests no standard of review here. This determination was not discretionary under any view. It either was factual or it was legal. Reliance on sentencing discretion misdirects because it offers neither good reasons for de novo review, nor good reasons for clear error review.

3. On balance, this Court's jurisprudence on standards of review counsels de novo review here. Because the principal congressional concern with lack of uniformity in sentencing lay across district lines, not within districts, appellate courts better than district courts can advance uniformity. Further, the Sentencing Commission's data undercut Respondent's claim that the courts of appeals decide too few Guidelines cases to promote that uniformity. In this area of federal sentencing, de novo review will guide the primary conduct of district judges, federal prosecutors and defense counsel. Not only police officers matter in deciding a standard of review.

ARGUMENT

Petitioner pled guilty to her state court armed robbery case in the county circuit court branch assigned initially only to her drug case. 7th Cir. Supp. App. 159. Why Judge DiMotto, rather than Judge Geske, presided that day now is a mystery. But it matters not, as the docket sheet for the armed robbery case leaves no doubt that the guilty pleas occurred in Judge Geske's drug branch.

Indeed, at the conclusion of Petitioner's pleas to armed robbery, Judge DiMotto simply "adjourn[ed] the matter for sentencing before Judge Geske on May 21, 1992 at 8:30 a.m. This sentencing to be in conjunction with the sentencing on the other case you have in Judge Geske's Court." 7th Cir. Supp. App. 169. Were Judge DiMotto acting either in his own branch or in Judge Wedemeyer's, only a transfer of the case would have accomplished that

scheduling before Judge Geske. The record reflects no such transfer.

THE SCOPE OF THE SENTENCING GUIDELINES TERMS "RELATED" AND "CONSOLIDATED" CALLS FOR DE NOVO REVIEW ON APPEAL

The government's argument for deferential review is not persuasive for two principal reasons. First, both the district court and the appellate court primarily undertake textual interpretation, not fact-finding, when they explicate an earlier construction of a statute or Sentencing Guideline. Second, neither Congress nor the traditions of federal sentencing alter the application of this Court's jurisprudence to mixed questions that arise well short of choosing a final sentence.

A. Statutory Construction Remains Legal, Not Factual, Even If Complicated By An Earlier Gloss.

1. Contrary to Respondent's view, the district court and the court of appeals below necessarily addressed the terms "related" and "consolidated," as the United States Sentencing Guidelines use them, in deciding Petitioner's challenge. Those are the Sentencing Commission's terms; the Commission nowhere speaks of cases "functionally consolidated," as Respondent does. *See* Govt. Br. 11, 18.

2. Instead, judicial interpretation and construction produced functional consolidation doctrine, as the United States acknowledges. Govt. Br. 16-17. By further interpreting an interpretation, or by refining a judicial gloss,

federal courts do not convert textual construction from a legal task to a factual one. *Contra* Govt. Br. 16-18. If the very concept of functional consolidation is controversial, as Respondent says, Govt. Br. 17 n.6, then how odd it would be if an appellate court could insulate such questionable doctrine in subsequent cases by reviewing the doctrine's application deferentially.

The Seventh Circuit's opinion bears out that court's focus on relatedness and consolidation, the Guidelines' terms. The court posed an early question, "So when are cases 'related'?," as it turned to its analysis. App. 55. It then described Petitioner as contending "that the imposition of sentence by a single judge on a single occasion was a consolidation of the drug offense with the armed robberies for sentencing, within the meaning of Application Note 3." App. 57. The court of appeals went on to write that, " 'Relatedness' and 'consolidation' are not pure questions of law." App. 60. Finally, it referred again to the concept of "relatedness" as a preface to "hold[ing] accordingly that whether cases have been 'consolidated' for trial or sentencing is a matter of fact, to be reviewed deferentially by the court of appeals." App. 62.[1]

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[1] The district court also appreciated the core interpretive task, having clarified the historical facts. "And so to the extent that either the government or you, Mr. Kagen [defense counsel], have any additional argument you want to make," the trial judge commented, "the court is simply left to draw from the record that was made before the Milwaukee County Circuit Court in May of 1992 as to whether or not these two cases were in fact consolidated, as that term is used in the context of the federal sentencing guidelines." App. 21.

That the Seventh Circuit also had to address its own earlier decisions concerning functional consolidation only meant those earlier interpretations of the Guidelines complicated the interpretive task. This did not change the quality of the appellate court's work from construing the underlying terms the Sentencing Commission chose, to considering only a district court's factual determinations. Neither did it change the district court's interpretation and application of the Guideline terms into simple fact-finding. The terms at issue remained "related" and "consolidated," and this case required further explication of those terms in light of the Seventh Circuit's earlier textual construction.

3. Petitioner agrees, of course, that a district court's historical factual findings stand here absent clear error, just as they do generally. But this petition presents only a question of the proper standard of review for determinations of unrelatedness of prior convictions. The task at issue concerns at least a mixed question of interpreting and applying terms the Sentencing Commission used in Guidelines and application notes.

B. Neither Statute Nor Tradition Alter This Court's Jurisprudence On Standards of Review Here.

The mixed question at stake invites de novo review in the end, in spite of Respondent's argument. The United States starts correctly with the observation that Congress may determine an appellate standard of review. Govt. Br. 23; *see Pierce v. Underwood*, 487 U.S. 552, 558 (1988). Petitioner also agrees that history and tradition may inform the choice of a standard of review. *See, e.g., Miller v.*

Fenton, 474 U.S. 104, 115-16 (1985); Govt. Br. 23-24. But those two propositions do not lead to the conclusion that review here should be deferential, or that this Court should alter the factors consistently pointing to de novo review.

Indeed, the Sentencing Reform Act of 1984 impels the conclusion that Congress sought to adopt shorthand this Court's jurisprudence on mixed questions of law and fact, rather than to abandon or change it. More, the government's resort to the undisputed history of district court discretion in fashioning sentences has little bearing on the standard of review here. That discretionary sentencing tradition is inapposite to this narrow question because Petitioner, the Seventh Circuit, and this Court all can unite on at least one proposition: the determination of relatedness of prior convictions either is predominantly legal or predominantly factual; in no event is it discretionary.

1. As both Petitioner and the United States have noted, 18 U.S.C. § 3742(e) provides that a court of appeals "shall give due deference to the district court's application of the guidelines to the facts." Respondent contends that this provision requires deferential review of a district court's conclusion that prior convictions are unrelated because not consolidated for trial or sentencing. *See* Govt. Br. 24-25. That contention holds, the government says, even though "the Court need not classify [consolidation] as a purely factual inquiry." Govt. Br. 14.

But the government imports too much to that part of § 3742(e). In a subsection that also requires a reviewing court of appeals to determine whether a sentence "was

imposed in violation of law," 18 U.S.C. § 3742(e)(1), or "as a result of an incorrect application of the sentencing guidelines," 18 U.S.C. § 3742(e)(2), a later amendment's closing reference to "due deference" does not reasonably signal a congressional purpose to alter this Court's decisions on standards of review. If anything, it signals that appellate courts should look to that standard of review jurisprudence.

In American law the term "due" usually resembles a grammatical transitive: it needs some direct object, some context or specific application, to have sense. Standing alone it has no content. This Court tacitly acknowledged as much in a previous encounter with the § 3742(e) "due deference" provision. *See Koon v. United States*, 518 U.S. 81, 98 (1996) ("The deference that is due depends on the nature of the question presented"); *see also Braxton v. United States*, 500 U.S. 344, 350 (1991) (clearly erroneous standard applies, "when reviewing a sentence, to findings of fact;" determination of meaning and effect of a stipulation reviewed instead to determine "whether the District Court was right").

Like the terms of § 3742(e), the legislative history of the 1988 act that added the "due deference" provision suggests that Congress meant the courts to consider established norms in deciding the standard of review. Referring to that particular provision, a description of the bill included in Representative Conyers's remarks explained that,

> This standard is intended to give the court of appeals flexibility in reviewing an application of

> a guideline standard that involves some subjectivity. The deference due a district court's determination will depend upon the relationship of the facts found to the guidelines standard being applied. If the particular determination involved closely resembles a finding of fact, the court of appeals would apply a clearly erroneous test. As the determination approaches a purely legal determination, however, the court of appeals would review the determination more closely.

134 Cong. Rec. H11257 (October 21, 1988).[2]

At least one First Circuit decision that then-Judge Breyer wrote reflects the same scaled understanding of the "due deference" provision. *See United States v. Wright*, 873 F.2d 437, 444 (1st Cir. 1989) ("due deference" provision means that "in appropriate instances," a court of appeals may review a Guidelines application under a clearly erroneous standard; a decision whether a defendant is a "minor" or "minimal" participant is one such instance).

For purposes of the standard of review, this Court has explained that judicial decisions traditionally fall into three categories: questions of law (reviewed de novo); questions of fact (reviewed for clear error); and matters of discretion (reviewed for abuse of discretion). *Pierce v. Underwood*, 487 U.S. at 558. That tripartite structure does not admit mixed questions, because when settling the standard of review the Court in the end either treats

[2] Petitioner notes that the subtitle of the report section including the amendment to § 3742(e) was "Minor and Technical Criminal Law Amendments Act of 1988." 134 Cong. Rec. 11252 (October 21, 1988).

those as questions of fact or as questions of law atop historical fact findings.

The § 3742(e) "due deference" provision does no more than invoke that traditional structure for assigning standards of review. Depending on the type of judicial decision, the deference "due" will range from much (a clear error standard) to little or none (a de novo standard).

Former Assistant United States Attorney Zipperstein overstates his case, then, when he suggests that the "due deference" phrase "seems incompatible with the nature and scope of de novo review." Steven E. Zipperstein, *Certain Uncertainty: Appellate Review and the Sentencing Guidelines*, 66 S. Cal. L. Rev. 621, 636 (1992), *quoted in* Govt. Br. 14. That phrase is incompatible with de novo review only when the specific question at issue tilts so heavily factual (or discretionary) that appellate courts should not review de novo as a matter of this Court's teaching. When the question is legal, though, little deference is "due." *Compare Koon*, 518 U.S. at 98 (on some issues, like mathematical error in applying the Guidelines, "the appellate court will be in as good a position to consider the question as the district court was in the first instance"). There is no incompatibility in this scaled approach.

So the "due deference" provision of § 3742(e) prompts inquiry into the type of judicial decision under review. By itself, it does not determine the standard of review.

2. The tradition of trial court discretion in sentencing does not counsel a deferential standard of review

here, either. Relying on *Koon*, on *Williams v. United States*, 503 U.S. 193 (1992), and on *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), the United States argues that, "The historical tradition of broad district court discretion in sentencing decisions also supports the conclusion that a district court's application of a Guideline to a particular set of facts should be reviewed deferentially." Govt. Br. 26. Although Petitioner agrees that district courts traditionally enjoy broad discretion in sentencing, she thinks the analogy to discretion here inapt.

Whether a district court's determination that prior convictions are unrelated is more legal (meriting de novo review) or more factual (deserving only clear-error review) is the question. Neither the court of appeals nor the parties have suggested until now that the determination of unrelatedness of prior convictions is discretionary. Quite the contrary, the court of appeals below adopted clear error as its standard, not abuse of discretion, and concluded that consolidation "is a matter of fact." App. 62.

Significantly, both *Koon* and *Williams* concerned departure decisions under the Sentencing Guidelines. *Koon* expressly adopted an abuse of discretion standard. *Koon*, 518 U.S. at 91, 100. *Williams* held that an appellate court must consider only for reasonableness those departures not resulting from error in interpreting the Guidelines, a standard comporting with abuse of discretion review. *Williams*, 503 U.S. at 202-04.

As Petitioner argued in her principal brief, a district court's departure decision comes almost at the end of the

sentencing analysis, and blends with the ultimate assessment of proper punishment. By definition, a district court departs at all from the Guideline range because the Sentencing Commission did not consider adequately some aggravating or mitigating factor, in kind or degree, and the factor "should result in a sentence different from that described." 18 U.S.C. § 3553(b).

But the task in this case, one component decision in the criminal history category determination, invokes none of the reasons for discretion embodied in deciding to depart, or in deciding an appropriate sentence within a Guideline range. Either earlier convictions were consolidated or otherwise related to one another, or they were not. That determination may be factual or it may be legal, but it is not discretionary. An analytical approach that invited district judges to exercise discretion in classifying prior convictions as related or not for criminal history purposes would wreak havoc on the uniformity goal of the Guidelines.

Even the dissenters in *Williams*, who favored less searching appellate review there, well appreciated that, "Congress intended appellate review under the new sentencing regime to guide and control the discretion long-reposed in the district courts toward the ultimate goal of sentencing reform: to promote fairness and rationality, and to reduce unwarranted disparity, in sentencing." *Williams*, 503 U.S. at 219 (White, J., dissenting).[3] This Court cannot promote proper uniformity by opening discretion

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[3] Justice Kennedy joined that dissent, and later authored the Court's opinion in *Koon*.

in predicate Guideline determinations that present no reason for discretion.

Almendarez-Torres, which concerned neither the Sentencing Guidelines nor standards of review, serviceably illustrates the proper separation between exercise of discretion in sentencing on the one hand, and predicate legal or factual determinations on the other hand. The Court there held that the fact of a prior aggravated felony, leading to a higher maximum statutory penalty, is a sentencing factor that a judge may determine, not an element of the offense in 8 U.S.C. § 1326. Nothing in the majority opinion suggested that the recidivism determination itself is discretionary. Rather, *Almendarez-Torres* implicitly recognized that determination as a factual finding, when the majority refused to decide what the standard of proof might be. 523 U.S. at 248.

Further, the *Almendarez-Torres* Court took pains to note that the finding of a prior aggravated felony, triggering a higher maximum sentence, did not impinge on a sentencing court's discretion in the way that a factor triggering a mandatory minimum sentence does. *Id.* at 244-46 (discussing *McMillan v. Pennsylvania*, 477 U.S. 79 (1986)). A mandatory minimum sentence binds a sentencing court, reducing its discretion. A higher maximum sentence arguably expands discretion, by opening a wider sentencing range. But the underlying determinant of either statutory penalty scheme owes nothing to discretion.

Accepting *Almendarez-Torres* as rightly decided,[4] that decision did not muddle discretion with fact-finding at the sentencing stage. The prior aggravated felony is a condition that the sentencing judge may find, as a factual matter, but it does not dictate what effect that judge will give it as a discretionary matter in imposing punishment within the expanded statutory range. *Almendarez-Torres* preserved a proper conceptual line between fact-finding and exercising discretion.

Whatever else it is, then, the relatedness determination here under UNITED STATES SENTENCING GUIDELINES MANUAL §§ 4A1.2(a)(2), 4A1.2 cmt. 3, and 4B1.2(c)(2), also is not discretionary. The argument that sentencing courts traditionally enjoy discretion in choosing a sentence is correct, but beside the point. Discretion lies principally in departure decisions in extraordinary cases, and in selecting a sentence within the Guideline range in typical ones. Albeit within the structure of the Guidelines, that discretion in the ultimate choice of sentence is no more or less than district courts traditionally have exercised.

3. This Court's jurisprudence on standards of review for mixed questions accordingly holds the answer to the proper standard here, not congressional directive or traditional sentencing discretion. This Court's institutional considerations do not call for deferential review as Respondent finally argues. Instead, on balance they promote independent review of this question.

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[4] The decision in *Apprendi v. New Jersey*, 120 S.Ct. 2348 (2000), preserves *Almendarez-Torres* as "at least an exceptional departure," 120 S.Ct. at 2361, but reflects continuing debate in this area.

Most of those institutional considerations, such as the primacy of court documents rather than witness demeanor here, Petitioner discussed at length in her first brief, and the United States does not refute. For that reason, Petitioner confines her reply to the factors that Respondent offers.

a. The United States posits primarily that deferential review, with decision-making more firmly lodged in district courts, better will advance uniformity. To the contrary, de novo appellate review best will achieve sentencing uniformity, because it provides meaningful precedent in an entire circuit and carries persuasive value beyond. A district judge's decision, by comparison, does not bind other judges in the same district, let alone other district judges within a circuit.

The legislative history of the Sentencing Reform Act fairly brims with concern for national uniformity in sentencing. As the 1984 Senate Report accompanying the Act explained, "These provisions introduce a totally new and comprehensive sentencing system that is based upon a coherent philosophy. They rely upon detailed guidelines for similarly situated offenders in order to provide for a greater certainty and uniformity in sentencing." S. REP. No. 98-225, at 38 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3221.

The dominant congressional focus was on disparities across all districts, not on disparities within individual districts. In the main, Congress looked inter-district, not intra-district. For example, the Senate Report compared the average sentence for bank robbery in the Northern

District of Illinois, five and one-half years, with the average sentence nationwide, eleven years. *Id.* at 41, 1984 U.S.C.C.A.N. at 3224.

Additionally, the Senate Report cited a 1972 study conducted for the United States Attorney's Office for the Southern District of New York, which found that the average prison sentence for forgery ranged from thirty months in the Third Circuit to eighty-two months in the District of Columbia Circuit; and for interstate transportation of stolen motor vehicles, from twenty-two months in the First Circuit to forty-two months in the Tenth Circuit. *Id.* at 41, 1984 U.S.C.C.A.N. at 3224 (citing Whitney North Seymour, Jr., *1972 Sentencing Study for the Southern District of New York*, 45 N.Y.S. B.J. (1973)).

Understandably, then, to achieve uniformity, Congress deployed the federal courts of appeals in their traditional law-clarifying role: "Appellate review of sentences is essential to assure that the guidelines are applied properly and to provide case law development of the appropriate reasons for sentencing outside the guidelines." *Id.* at 150, 1984 U.S.C.C.A.N. at 3333. Congress also anticipated that appellate review would supply a first interpretive gloss to ambiguous Guideline terms. "The case law that is developed from these appeals may, in turn, be used to further refine the Guidelines." *Id.* at 52, 1984 U.S.C.C.A.N. at 3235.

b. Readily available data also undermine the government's contention that courts of appeals see too few sentencing appeals to assure uniformity of application. Some 6.6% of all sentencing appeals raised the definition of related cases under § 4A1.2 in fiscal year 1999. U.S.

Sentencing Commission, 1999 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, Appeals Datafile, Table 59. Since fiscal year 1996, that percentage never has dipped below 4.5% (in 1998), and has risen to as high as 7.0% (in 1997), according to the same source. And in fiscal year 1999, across all circuits, 60.6% of criminal appeals presented at least some sentencing issue. U.S. Sentencing Commission, 1999 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, Appeals Datafile, Table 55. The number of cases appealed adequately allows federal appellate courts to promote uniform interpretation and application of the terms "related" and "consolidated."

More importantly, the doctrinal uniformity that appellate courts uniquely can promote depends not on the volume of relatedness appeals reaching those courts. If district courts obey the rulings of courts of appeals in their respective circuits – an assumption on which the hierarchy of federal courts largely depends – then even one clear statement of doctrine or legal interpretation on a given point ought to advance uniformity.

c. Finally, the United States contends that police officers and state judges would benefit little from the effort federal appellate courts would expend on de novo review. Whether that is true of state courts or not (and both Petitioner and Respondent only can guess), respect for comity and federalism warrants the marginal investment. Moreover, federal district judges, federal prosecutors, and defense counsel also are actors whose "primary conduct," Govt. Br. 31, independent appellate review will guide beneficially. In this federal sentencing case,

the United States overlooks those actors, who here matter more than police officers.

CONCLUSION

This Court should reverse and remand for reconsideration under a de novo standard of review. Petitioner so prays.

Respectfully submitted,

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